

Determination 2022/028 was modified under section 211(1)(a) of the Building Act 2004 by the District Court on 25 July 2023 in [2023] NZDC 15205.

1. Paragraph 1.2.1 is modified to remove the name of one of the owners of the property.
2. The first sentence of paragraph 2.5 is modified to add “ex” as follows: ‘The previous lintel that spanned the garage door opening was formed using two **ex** 50mm thick by 300mm deep timber building elements’.
3. Paragraph 5.1 is modified to add the words shown in bold as follows: ‘The matters to be determined relate to an exercise of powers of decision by the authority to refuse to grant a building consent on 28 September 2020, **but not sent to the applicant until it was attached to a letter from the Wellington City Council to the applicant dated 9 October 2020**, and the subsequent issue of a notice to fix, for building work to alter an existing detached dwelling’.

Determination 2022/028

Regarding the refusal of a building consent and issue of a notice to fix for alterations to an existing dwelling

34 Satara Crescent, Khandallah, Wellington

Summary

This determination considers whether the authority was correct in its exercise of powers of decision to refuse to grant a building consent for alterations to an existing detached dwelling, and its subsequent decision to issue a notice to fix. In deciding these matters, I have also considered whether the building work could have been carried out urgently in advance of obtaining a building consent, and whether the owners are now required to apply for a certificate of acceptance.

In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”) and references to “clauses” are to clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992.

The Act and the Building Code are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents (eg Acceptable Solutions) and guidance issued by the Ministry, is available at www.building.govt.nz.

1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Katie Gordon, National Manager Building Resolution, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.¹
- 1.2. The parties to the determination are:
 - 1.2.1. T [REDACTED] O’Brien, the owners of the property who applied for this determination (“the owners”), using the services of a legal advisor.²
 - 1.2.2. Wellington City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3. This determination arises from the authority’s decisions to refuse to grant a building consent (number 468097) and to issue a notice to fix (number 473630) for building work to alter an existing detached dwelling.
- 1.4. The refusal of the building consent and subsequent issue of the notice to fix was in respect of building work to install a structural beam above a garage door opening. There was a dispute over the authority’s charges and fees for the consent which resulted in some of these not being paid and the building consent not being granted. The building work was subsequently carried out without a building consent.
- 1.5. The owners consider that the building work was required to be undertaken urgently. The owners had concerns about the likelihood of building collapse under severe wind load or earthquake action due to the deflection and general condition of an existing timber lintel installed above the garage door.
- 1.6. The matter to be determined, under sections 177(1)(b), (2)(a) and (2)(f), is whether the authority was correct in its decisions to:
 - 1.6.1. refuse the application for the building consent 468097

¹ The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

² For the purposes of this determination, the reference to “the owners” includes their legal advisor.

- 1.6.2. issue a notice to fix to the owners for not complying with section 40 of the Act.³
- 1.7. In deciding this matter, I must consider the reason for the refusal of the building consent, which subsequently gave rise to the issue of the notice to fix. In doing this, I will need to decide whether the work can be considered to be urgent works as outlined in section 41(1)(c).

Issues outside this determination

- 1.8. I have not considered any other aspects of the Act or of the Building Code, nor have I considered the Building Code compliance of the building work covered by the building consent.
- 1.9. The owners have raised issues regarding how the authority performed its duties, including (but not limited to) its adherence to statutory time frames in accordance with section 48(1A) of the Act, and the authority's procedures for processing the building consent. Issues related to how the authority performed its duties, functions, and responsibilities are not within the scope of matters that can be determined, which are outlined in section 177 of the Act.⁴
- 1.10. The owners raised several other issues concerning the charges and fees related to the building consent application⁵, inspections, and code compliance certificate. Issues related to charges and fees imposed by an authority⁶, or the building levy, are also not included in section 177 of the Act.⁷
- 1.11. I have not considered the compliance of the original timber lintel installed above the garage door opening, or whether there was a requirement to install a mid-span structural column below the original timber lintel.⁸
- 1.12. The owners have raised issues with requests made to the authority under the Local Government Official Information and Meetings Act 1987, as well as other issues related to the Consumer Guarantees Act 1993 and the Money Claims Act 2010. I have no jurisdiction under other enactments and this determination only considers matters related to the Building Act 2004 and its regulations.

³ Section 40: Building work not to be carried out without consent.

⁴ Section 177 provides the matters that a party may apply for a determination in relation to.

⁵ Section 45(1)(d) of the Act.

⁶ In accordance with either section 219 – "Territorial authority may impose fee or charge and must collect levy", or section 240 – "Building consent authority may impose fee or charge and must collect levy".

⁷ Prior to the application for determination, the owners had filed proceedings in the District Court (primarily in relation to authority's charges and fees) and has sought "an injunction preventing the [authority] from actioning the Notice to Fix pending the outcome of these proceedings". However, under section 183 of the Act, any decision or exercise of power by the authority that relates to the matter was suspended until the determination is made.

⁸ The original building work preceded the enactment of the Building Act 1991 (refer clause 8 – Existing buildings not required to be upgraded).

2. The building work

- 2.1. The two-storey detached dwelling was first constructed in 1985 under a building permit issued by the authority prior to the former Building Act 1991.
- 2.2. The double garage at ground floor level is situated below two bedrooms, a bathroom, and toilet at first floor level.
- 2.3. The clear span of the single garage door opening is approximately 4.25m wide (refer to Figure 1(a)).⁹
- 2.4. I note the original plans attached to the building permit from 1985 indicate two vehicle door openings approximately 2.4m wide. The openings were separated by a 'column' formed using timber framing and a brick veneer as external cladding. Evidence provided by the owners appears to indicate the as-built construction may not have included the 'column', for reasons that are not clear.
- 2.5. The previous lintel that spanned the garage door opening was formed using two 50mm thick by 300mm deep timber building elements. This was replaced by a single specific engineering design 380mm deep 'parallel flange channel' ("PFC") supported at either end by timber studs. The PFC (in part) supports elements of the first-floor construction and roof above (refer to Figure 1(b)).
- 2.6. The specific engineering design of the PFC and supports was undertaken by a Chartered Professional Engineer who was responsible for the preparation of structural calculations, plans, and a Producer Statement – Design (PS1), dated 19 May 2020, that indicated compliance of the design with clause B1 Structure.



(a) Before (approx. November 2007) (b) After (October 2020)

Figure 1: West elevation 'before' and 'after' building work

⁹ The dimension is taken from structural calculations prepared by a Chartered Professional Engineer in support of the plans and specifications associated with building consent application 468097.

3. Background

- 3.1. In September 2019, the owners had concerns “the lintel...above the garage door...had been collapsing over time and the rate of collapse was increasing”. The owners were concerned about how the lintel “would perform in a severe storm or significant earthquake”.
- 3.2. On 15 July 2020, the owners (using the services of an agent) applied to the authority for a building consent for¹⁰:

Installation of a new steel beam to remove deflection from existing timber beam for support of second level.
- 3.3. From July 2020 onwards, in correspondence between the owners and the authority, the owners disputed the charges and fees imposed by the authority related to the building consent, the authority’s inspections of the building work, and the issue of a code compliance certificate (refer to paragraph 1.10).
- 3.4. The authority issued a payment request for \$1,493.75 on 24 July, which was paid by the owners and a receipt issued on 27 July. The authority advised on 27 July it had incorrectly calculated the original fee and updated the amount required to \$1,942.25. The authority advised that it would continue with processing the consent but the outstanding fees would need to be paid before the consent could be issued. By 3 August, when processing of the consent had been completed, the amount outstanding had risen to \$530.25.
- 3.5. On 28 July 2020, the owners advised the authority “the significant portion of this work is to be completed under Schedule 1”¹¹ and “this work must proceed with urgency...The rate of beam deflection is increasing over time, and it is causing damage to the upper level wall linings (internal and external), flooring, and likely weather tightness”. The owners also expressed concern about “how the current beam will perform in a seismic event”.
- 3.6. On 29 July 2020, the owners stated the only aspect of the work that is subject to the building consent is the “steel beam and two top-plate connections”.

¹⁰ The authority has submitted the original building consent application dated 15 July 2020 was rejected due to a lack of information, and a new application was made and accepted on 27 July 2020. I have only received evidence of the original building consent application dated 15 July 2020 and nothing to confirm this was rejected by the authority for the reasons stated. The owners are of the view “the initial application was not rejected” and “there was no further application or reapplication for building consent”. Regardless, I note the authority did raise several requests for further information on 16, 21, 22, 23, and 30 July 2020; the owners or agent responded to the authority on 20, 21, 22, 23 July 2020 and 1 August 2020.

¹¹ Schedule 1 of the Act – Building work for which building consent not required. The owners did not state which clause(s) of Schedule 1 they were relying on to inform their view.

- 3.7. On 3 August 2020, the authority granted the building consent in accordance with section 49(1) of the Act.⁽¹²⁾⁽¹³⁾
- 3.8. On 3 August 2020, the authority sent an email to the owners titled “awaiting payment” for the building consent “processing”, identifying \$530.25 as the amount to be paid.
- 3.9. On 12 August 2020, the owners sent an email to the authority stating:

The only part of this work that is subject to consent is the lintel beam replacement. This is now urgent as it is causing consequential damage to the floor above, the cladding, and internal linings. This can't be repaired under Schedule 1 until the beam is replaced. If building consent is not issued with[in] the statutory time frame then the [work will] proceed with urgency under Section 41[1](b) and (c) of the Building Act.¹⁴

- 3.10. In a letter emailed to the authority on 15 August 2020, the owners stated they had:

...instructed the builder to proceed with the work under Section 41[1](b) and (c) of the Building Act. The beam is progressively failing, and goodness knows how it might perform under seismic loading.

[The owners] request that [the authority] confirm that the processing and issuing of [the] building consent for this urgent work will not be delayed due to disputed fees.

- 3.11. The owners submit that on 28 August 2020 they were advised by the authority the processing of the building consent application had been completed.
- 3.12. On 28 August 2020, in correspondence to the authority, the owners stated they had instructed their “builder to proceed with the work as previously advised”.
- 3.13. On 28 August 2020, in an email to the owners, the authority stated:

3.13.1. it was ready to issue the building consent on 3 August 2020, but it will remain suspended for unpaid fees¹⁵

¹² Section 49(1) - A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.

¹³ Information provided to the Ministry included a copy of the authority's building consent processing documentation completed on 3 August 2020.

¹⁴ Section 41(1)(b) does not relate to building work undertaken urgently (it is in respect of building work described in Schedule 1 for which a building consent is not required). Further, for the purposes of this determination I have assumed the owners reference to section 41(1)(c) is in respect of sub-section (i), and not sub-section (ii) which relates to specified systems (which are not contained in the detached dwelling).

¹⁵ I have received conflicting information about when the owners did make a payment(s) to the authority in respect of charges and fees for the building consent, including (for example) an amount paid on 15 July 2020 and/or 24 July 2020.

- 3.13.2. the authority noted the owners had advised the “builder to proceed with the work under urgency (Sec 41)” and the authority “is unable to issue a building consent for work that has been done. As a result [the authority] will be starting the refusal of [the] building consent process”
- 3.13.3. If the work has already been done without a building consent, but required one, the owners “will need to apply for a certificate of acceptance for that work...Failure to do so may result in enforcement action”.
- 3.14. On 29 August 2020, the owners directed their “builder to proceed with the replacement of the failing lintel beam as urgent work to protect [their dwelling] from further damage”.
- 3.15. On 22 September 2020, the owners notified the authority by email that “in order to protect [the owners’] property and life safety the building work will proceed this week at [the owners’] instruction”.¹⁶
- 3.16. On 22 September 2020, the building work commenced to replace the timber lintel with the new PFC.
- 3.17. On 25 September 2020, the authority stated in an internal email:
- So [the authority] granted [the building consent] within 20 days but the [owners] won’t pay [the] fees so we won’t issue the consent...without this being paid.
- 3.18. The building work was completed on or before 27 September 2020, and the Licenced Building Practitioner (the builder) subsequently provided a Producer Statement – Construction (PS3) dated 14 October 2020.¹⁷
- 3.19. On 27 September 2020, the owners sent an email to the builder (copied to the authority) to confirm the new lintel beam had been installed.
- 3.20. On 28 September 2020, the authority issued a written notice (addressed to the agent) under section 50 of the Act refusing to grant the building consent.¹⁸ The written notice stated:
- This letter is to inform you that...building consent application [468097] has been refused.

¹⁶ I note the owner’s submission also refers to a separate notification sent to the authority on 13 September 2020. However, a copy has not been provided to the Ministry in support of this determination.

¹⁷ LBP carpentry licence class granted on 8 April 2013. The PS3 was in respect of “re-clad of west face above garage”; it does not refer to the new beam installed.

¹⁸ The owners dispute the letter was sent to their agent (the addressee stated in the written notice), and the owners only received a copy on 9 October 2020 attached to an email sent by the authority. On 19 October 2020, the builder stated he had not received a letter from the authority. On 28 October, the authority confirmed “the refusal letter was not sent” to the agent of the owners as the authority was “responding to two of [the owners] complaints at the same time”.

As the work has been undertaken on this project without a building consent it is now unauthorised building work which is an offence under the Building Act 2004.

[The authority] may issue a notice to fix in regards of the work that has been done. [The authority] may also require a certificate of acceptance application is lodged for this work.

3.21. On 19 October 2020, the Chartered Professional Engineer issued a Producer Statement – Construction Review (PS4). It confirmed the engineer had undertaken construction monitoring of the “beams and studs”¹⁹, and compliance of the building work with clause B1 Structure²⁰.

3.22. On 20 January 2021, the authority issued a notice to fix (as an attachment to an email) to the owners under sections 164 and 165 of the Act²¹, reference number 473630. The particulars of contravention or non-compliance stated:

Building work with no building consent

Building work, namely the installation of a structural beam has been done without a building consent. Section 40 of the Building Act 2004 requires that a building consent must be obtained prior to undertaking any building work.

The notice went on to state:

To remedy the contravention or non-compliance you must....apply for a Certificate of Acceptance or remove the building work within 30 days of the date of this notice. Any additional work not yet undertaken must not be started until a building consent has been obtained from the [authority]....This notice must be complied with by 19 February 2021.

3.23. On 12 March 2021, the authority emailed the owners stating:

In relation to the building work that was undertaken without consent, [the owners are] required to apply for and obtain a certificate of acceptance (COA). Please advise what steps have been taken to progress with a COA application.

3.24. On 30 March 2022, the Ministry received an application for a determination.

¹⁹ The inspection was conducted on 25 September 2020.

²⁰ I note the PS4 also included reference to building consent 468097.

²¹ Section 164 – Issue of notice to fix; section 165 – Form and content of notice to fix.

4. Submissions

The owners

4.1. The owners are of the view:

- 4.1.1. The failing lintel above the garage door had a 17mm deflection at its centre “and a significant bow at the lintel and gutter line” (refer to Figure 1(a)).
- 4.1.2. The failing lintel “had caused the plasterboard walls and ceiling in the room above the lintel...to crack”. Further, “the floor had a significant slope and the floor sheets had lifted”, and “the fibre cement façade has cracked and the cedar profile weatherboard [external cladding] was cupped and bowed”.
- 4.1.3. They had significant concerns about the likelihood of collapse of the building under severe wind load or earthquake action, and so authorised the “builder to proceed with the repair as urgent building work”.
- 4.1.4. Some elements of the building work are not subject to building consent and are covered under the Schedule 1 provisions of the Building Act²² (ie all other work not related to the replacement of the lintel itself).²³
- 4.1.5. Urgent building work does not require building consent and so is not a contravention of section 40 of the Act, but it does require an application for a certificate of acceptance after the work has been completed.²⁴ Consequently, the authority’s notice of refusal dated 28 September 2020²⁵ “incorrectly states that because the building work has been undertaken without [a] building consent it is unauthorized building work”. Further, the particulars of contravention or non-compliance stated in the notice to fix “are incorrect and do not apply”.
- 4.1.6. The Building Act does not require an owner to notify the authority if they intend to undertake urgent building work.
- 4.1.7. The owners intend to apply for a certificate of acceptance in accordance with the Building Act. However, “only if this is deemed necessary after the matter has been considered by the [District] Court”.

²² Sections 41(1)(b), and 42A - Building work for which building consent is not required under Schedule 1. For example, the owners referred to the replacement of the external wall cladding.

²³ On 5 August 2020, I note the builder provided a quote for the building work; this was only relation to the garage beam, engineers fees, materials, garage door removal, and labour, and appeared to not include or reference any building work proposed to be undertaken under Schedule 1.

²⁴ Section 42 of the Act: Owner must apply for certificate of acceptance if building work carried out urgently (1) If, in reliance on section 41(1)(c) ..., building work is carried out without a building consent having been obtained in respect of that work, the owner must, as soon as practicable after completion of the building work, apply for a certificate of acceptance under section 96.

²⁵ Refusing to grant the application of the building consent.

- 4.1.8. The Building Act “does not require immediate application for [a] certificate of acceptance, but as soon as practicable”.
- 4.1.9. The authority did not dispute the building work was urgent.
- 4.1.10. The originally installed timber lintel “had failed to meet the serviceability limit state²⁶ within the intended life of the building”²⁷, and this was not disputed by the authority.
- 4.1.11. Removing the new PFC, which was a remedy in the notice to fix, “would involve building work and if it [was] removed” the dwelling “would immediately collapse”.
- 4.1.12. “The replacement lintel beam has levelled the floors, straightened the gutter, and closed up the cracks in the interior wall linings. The [dwelling] no longer judders, even under extreme wind gusts. However there remains a significant amount of restorative work to do including wall crack repairs, re-plastering, painting, floor sheet re-fixing, door re-hanging, and cracked tiles to replace”. The “work is not complete and will not be completed until after court proceedings” and is to be “appropriately completed under Schedule 1” of the Act.
- 4.1.13. “As the work is incomplete there is no compulsion at this time to apply for a certificate of acceptance” under section 42(1) of the Act.

The authority

- 4.2. The authority is of the view:
- 4.2.1. The building consent application was granted (under section 49(1) of the Act) on 3 August 2020 “but was not issued due to unpaid fees” (under section 49(2))²⁸.
- 4.2.2. Based on information from the owners that the work had already been carried out, the authority “refused the application” on 28 September 2020.

²⁶ *Australia / New Zealand Standard NZS 1170.0:2002, Structural design actions, Part 0: General principles*, Section 1 Scope and General, sub-section 1.4 Definitions: States that correspond to conditions beyond which specified service criteria for a structure or structural element are no longer met. The criteria are based on the intended use and may include limits on deformation, vibratory response, degradation or other physical aspects.

²⁷ I note the application for a building permit for the construction of the dwelling in 1985 does not appear to indicate the intended life of the building. The owners did refer to Wellington City Bylaw 1982/1 (Building) and NZS 1900.1:1964 Model Building Code (Preliminary). However, I have not been provided with either document to ascertain if they state anything in respect of the intended life of the building.

²⁸ Section 49(2) – However, a building consent authority is not required to grant a building consent until it receives (a) any charge or fee fixed by it in relation to the consent; and (b) any levy payable under section 53.

- 4.2.3. The notice to fix was only issued when it became apparent the owners were not prepared to apply for a certificate of acceptance.
- 4.2.4. It acknowledges the owners' "concern over removing the building work, but this was given as an option should [the owners] wish to undertake the work under a building consent".
- 4.2.5. To date, it has not received an application for a certificate of acceptance as required by the notice to fix and section 42 if, as the owners claim, the work was carried out under urgency.
- 4.2.6. It was correct in refusing to grant the building consent under section 50 of the Act and subsequently issuing a notice to fix under section 164.

5. Discussion

- 5.1. The matters to be determined relate to an exercise of powers of decision by the authority to refuse to grant a building consent on 28 September 2020, and the subsequent issue of a notice to fix, for building work to alter an existing detached dwelling.
- 5.2. The building work to install a replacement structural beam above a garage door opening had been undertaken without first obtaining a building consent.
- 5.3. The owners are of the view the building work was required to be undertaken urgently. The owners had concerns about the likelihood of building collapse under severe wind load or earthquake action due to the deflection and general condition of an existing timber lintel.

Legislation

- 5.4. Under sections 4(2)(q)(i) and 14B of the Act, an owner is accountable and responsible for obtaining any necessary consents, approvals, and certificates.
- 5.5. Section 40 of the Act states a person must not carry any building work except in accordance with a building consent.
- 5.6. Section 44 of the Act states an owner intending to carry out building work must, before the building work begins, apply for a building consent.
- 5.7. Section 41 of the Act states, despite section 40, a building consent is not required in certain cases. This includes:
 - 5.7.1. section 41(1)(b) for any building work described in Schedule 1 (building work for which building consent not required) and section 42A

- 5.7.2. section 41(1)(c) for any building work in respect of which a building consent **cannot practicably be obtained in advance** because the building work has to be carried out urgently [my emphasis].
- 5.8. Building work undertaken in accordance with section 41(1)(c) must be carried out urgently for the reasons specified in section 41(1)(c)(i) and (ii)²⁹:
- (i) For the purpose of saving or protecting life or health or preventing serious damage to property...
- 5.9. Section 42 of the Act states an owner must apply for a certificate of acceptance if building work is carried out urgently:
- (1) If, in reliance on section 41(1)(c)..., building work is carried out without a building consent having been obtained in respect of that work, the owner must, as soon as practicable after completion of the building work, apply for a certificate of acceptance under section 96.
- 5.10. Section 49(2) of the Act states that a building consent authority is not required to grant a building consent until it receives (a) any charge or fee fixed by it in relation to the consent; and (b) any levy payable under section 53.

Building work to be carried out urgently

- 5.11. In this case, I need to consider whether the building work had to be carried out urgently such that it was not practicable for the owners to obtain a building consent in advance of the work.
- 5.12. The issue of urgent building work has been considered by the High Court in *O'Byrne v Waimakariri District Council*³⁰:

[31] Before s 41(1)(c)(i) can apply there must be such an imminent danger to life, health or property that it is impracticable to obtain a building consent in advance. This high threshold reflects the underlying statutory policy that in the ordinary course of events a building consent must be obtained before building work begins ([sections] 40 and 44) and that failure to comply with this requirement gives rise to an offence of strict liability ([section] 388). If this statutory purpose is to be preserved the cases in which a defence under s 41(1)(c)(i) is made out are likely to be relatively rare.

- 5.13. In this case, the owners had concerns with the apparent and increasing deflection in the existing timber lintel installed across the garage door opening that was originally installed in 1985 (when the dwelling was first constructed).

²⁹ I have not repeated section 41(1)(c)(ii) here as it does not apply to this determination.

³⁰ High Court Christchurch CRI-2011-409-000065, Chisholm J, 25 August 2011.

- 5.14. The evidence provided by the owners does indicate the original timber lintel had deflected over time (refer to Figure 1(a)), and this appears to have affected elements of the floor, external wall, and roof construction above.
- 5.15. For section 41(1)(c) to apply, a building consent must not be practicably able to be obtained in advance of the building work. In this case, the owners did apply for a building consent on 15 July 2020. This was in advance of the building work that commenced on 22 September 2020.
- 5.16. The authority confirmed it had processed and granted the building consent on 3 August 2020 in compliance with section 49(1) of the Act (refer to paragraph 3.13.1). However, in accordance with section 49(2) of the Act, an authority is not required to grant a building consent until it receives any charge or fee fixed by it in relation to the consent and any levy payable under section 53 of the Act. I take the authority's statement to mean that it was ready to grant the building consent subject to payment of the outstanding fees.
- 5.17. Based on the information provided by the parties, it is clear the only reason the building consent was not granted and issued by the authority was because the owners did not pay some fees the authority believed to be outstanding. I consider that in the circumstances concerned, this was not a valid reason for the owner to proceed with the building work without first obtaining a building consent. To suggest otherwise would be contrary to the provisions in the Act, such as sections 49(2), 53, 219 or 240.
- 5.18. I accept that there is evidence the lintel had deflected. However, the information provided does not indicate the building work described in the building consent was required to be carried out urgently (ie it was not impractical to obtain a building consent in advance of the building work commencing on 22 September 2020) for the purpose of protecting life or health or preventing serious damage to property.
- 5.19. In some circumstances, it may be appropriate to consider whether temporary measures are available to mitigate any risk to life, health or property while building consent is obtained. In this case, the owners have not provided any information about whether they considered any temporary solutions to limit further deflection of the lintel while building consent was obtained, such as the installation of temporary structural props.
- 5.20. In coming to the view that the building work described in the building consent did not meet the threshold to be carried out urgently in accordance with section 41(1)(c), I have also considered that the building consent application was made in July 2020, the owners were aware from at least 3 August 2020 that fees of \$530.25 were outstanding and that the owners were aware from at least 28 August 2020 that the consent was ready to be granted subject to outstanding fees being paid. The owners advised the authority several times of their intention to instruct the builder to commence building work under section 41(1)(c), and it appears this

instruction was given around 29 August 2020 with work commencing 22 September 2020.

- 5.21. I acknowledge that the owners do not consider that the fees sought by the authority were correct. However, this is not an appropriate reason to carry out work without building consent under section 41(1)(c).
- 5.22. Taking these factors and the information available to me in this case into consideration, I am of the view the building work did not meet the high threshold for building work to be carried out urgently (without first obtaining a building consent) in accordance with section 41(1)(c) of the Act.

Refusal to grant a building consent

- 5.23. On 28 September 2020, the authority exercised a power of decision to refuse to grant the building consent 468097 (in accordance with section 50 of the Act), noting that:

As the work has been undertaken on this project without a building consent it is now unauthorised building work which is an offence under the Building Act 2004.

- 5.24. The authority considers that since the building work had already been completed on 27 September 2020, it was correct to refuse to grant the building consent. I agree that this is a valid ground on which to refuse to grant the consent. There is a statutory obligation on an owner to obtain a building consent before building work begins and not to carry out any building work except in accordance with a building consent. There are exemptions such as those described in section 41 of the Act. However, the owner did not apply for a discretionary exemption under clause 2 of Schedule 1 (nor did the authority suggest it as a possible alternative), and the work is not exempt under any of the other clauses in Schedule 1.
- 5.25. The owners did apply for a building consent but proceeded to carry out the building work without the consent being granted and issued by the authority (due to non-payment of some of the charges and fees for the consent that the authority believed were owed).
- 5.26. Section 49(2) does not require an authority to issue a building consent until it receives any charge or fee fixed by it in relation to the consent. For this reason, the authority was not required to grant the consent before the relevant fees were paid. However, I note the authority did not refuse to grant the building consent for non-payment of fees, rather the reason for refusal was limited to the work having been already carried out without a building consent. Once the work had been undertaken the authority was no longer able to grant the consent.

Issue of the notice to fix

- 5.27. On 20 January 2021, the authority issued a notice to fix to the owners under section 164 of the Act. This was on the basis the particulars of contravention or non-compliance were “building work, namely the installation of a structural beam has been done without a building consent. Section 40 of the Building Act 2004 requires that a building consent must be obtained prior to undertaking any building work”.
- 5.28. The authority stated the notice to fix was only issued when it became apparent the owners were not prepared to apply for a certificate of acceptance. This was following earlier advice the authority gave to the owners on 28 September 2020 when it confirmed that it may issue a notice to fix, which may require the owners to apply for a certificate of acceptance.
- 5.29. The general requirements in respect of notices to fix, including their form and content, have been discussed in previous determinations³¹ so I do not intend to repeat them here beyond those aspects that are relevant to the dispute.
- 5.30. The owners dispute the issue of the notice to fix on the basis that urgent building work does not require a building consent and is not a contravention of section 40 of the Act.
- 5.31. I have already determined the building work in this case did not meet the test for carrying out building work urgently in accordance with section 41(1)(c) of the Act. Therefore, I consider that the authority correctly identified the particulars of the contravention and non-compliance with section 40 of the Act in the notice to fix.
- 5.32. To remedy the contravention or non-compliance, the notice to fix stated the owners must either apply for a certificate of acceptance or remove the building work within 30 days of the date of the notice.
- 5.33. Certificates of acceptance are available to regularise building work for which building consent was not sought when building consent was required. While I have concluded that the building work did not meet the high threshold for building work to be carried out urgently, I note that any owner undertaking building work without first obtaining consent in reliance on section 41(1)(c) must also apply for a certificate of acceptance as soon as practicable after completion of the building work (section 42).
- 5.34. In this case, the owners have stated “the only part of this work that is subject to consent is the lintel beam replacement”. This corresponds with the application for the building consent in respect of the “installation of a new steel beam to remove

³¹ For example, 2022/018 “Regarding a notice to fix issued for a relocated unit, 54 Willoughby Street, Halcombe” dated 5 October 2022 at paragraphs 4.59 to 4.61 inclusive; 2022/020 “Regarding the issue of a notice to fix and the refusal to issue two discretionary exemptions under schedule 1(2) for building work to an outbuilding as 125 Blacks Road, Opoho, Dunedin” dated 28 October 2022 at paragraphs 5.4 to 5.6 inclusive.

deflection from existing timber beam for support of second level". The building work to replace the beam was completed on or before the 27 September 2020.

- 5.35. The owners have referred to incomplete "restorative work" (refer to paragraph 4.1.12), and that this would be covered under Schedule 1 of the Act (refer to paragraph 4.1.4). Based on the information provided by the parties, I have seen nothing to suggest that the restorative work is not exempt from the requirement to obtain building consent.
- 5.36. There is a clear distinction between the building work described in the building consent and the "restorative work" that could reasonably be undertaken under Schedule 1 at a future point in time. Therefore, there does not appear to be any impediment for the owners to proceed to apply for a certificate of acceptance under section 96.
- 5.37. In respect of the alternative remedy to remove the building work, although this may be an option, both parties appear to acknowledge the practical difficulties this may present (including not adversely affecting the structural integrity of the building or part thereof). However, I also acknowledge the authority's view that removal of the work was an option if the owners wanted to obtain a building consent for the work in order to subsequently get a code compliance certificate, rather than a certificate of acceptance. On balance, I consider it was appropriate for the authority to provide this as a potential remedy.

6. Conclusion

- 6.1. The building work to install the new structural beam across the garage door opening did not meet the test under section 41(1)(c) of the Act because it was practicable for the owners to obtain a building consent in advance of carrying out the building work. Indeed, the owners did apply for a building consent and the authority had processed and made its decision to grant the building consent. However, the building consent was not granted and issued by the authority when processing was completed due to non-payment of some of the charges and fees for the consent that the authority believed were owed.
- 6.2. The authority was correct to refuse to grant the building consent 468097 on the basis the building work described in the building consent had already been carried out by the owners prior to the consent being granted and issued.
- 6.3. The authority was correct to issue the notice to fix on the basis that the building work to install the new structural beam was carried out contrary to the requirements of section 40 of the Act and the notice included appropriate remedies.

7. Decision

7.1. In accordance with section 188 of the Building Act 2004, I determine the authority was correct to

7.1.1. refuse to grant the application for building consent 468097, and

7.1.2. issue the notice to fix 473630 for non-compliance with section 40 of the Act, and I confirm both decisions.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 16 December 2022.

Katie Gordon

National Manager, Building Resolution